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In the

# Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 810.

PHILIP EGNER, FREDERICK C. MAYER AND SHAPIRO, BERNSTEIN & CO., INC.,
Petitioners,

v.

E. C. SCHIRMER MUSIC COMPANY,
Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## RESPONDENT'S BRIEF

### IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioners seek to review a decision of the United States Circuit Court of Appeals for the First Circuit which unanimously affirmed, on the law and on the facts, a decision of the United States District Court for the District of Massachusetts, dismissing the bill of complaint after a full trial.

The facts are fully set forth in the decisions of the District Court (48 Fed. Supp. 187) and of the Circuit Court of Appeals (139 Fed. (2d) 398) and, so far as material to the questions presented, are hereinafter stated. The Circuit Court of Appeals found that the findings of fact by the District Court were not erroneous. Nor do the petitioners claim that the findings are unsupported by evidence.

## POINT I.

### No Question of Federal Law or of General Public Importance is Presented.

The musical composition involved in this action is "The Caisson Song". As shown by the decisions of the lower Courts, the ruling in this case was based on the particular facts and circumstances surrounding the activity or lack of activity on the part of the author or proprietor of that song. Obviously the ruling with respect to these matters is limited to the facts in this case. It is therefore difficult to contemplate any other case involving substantially identical or similar facts. The decision in this case cannot therefore be considered as one of general public importance.

## POINT II.

### The Decision of the Circuit Court of Appeals, First Circuit, is Not in Conflict With the Decisions of Any Other Circuit or of This Court.

Although petitioners cite the following cases as "probably" in conflict with the decision of the Court below, they fail to support such contention.

In *Chesapeake & O. R. Co.* v. *Martin,* 283 U.S. 209, this Court expressed its unwillingness to disturb the findings of the Court below "unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable" (p. 214). The evidence in this case supporting the finding of the Trial Court cannot be so characterized.

In *Ferris* v. *Frohman,* 223 U.S. 424, the Court held that the performance of a play was not a "publication" thereof. In the instant case it appeared without contradiction that the composition had been printed and sold openly and unrestrictedly for many years. Such distribution of a literary or musical work constitutes "publication" sufficient to dedi-

cate the work to the public use unless accompanied by compliance with the Copyright Statute.

In *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, this Court held that the exhibition of a painting under restrictions was not a "publication". This is not in conflict with the decision of the Circuit Court below, because in this case as already stated, there was an unrestricted printing, sale and distribution of the work.

Nor is the decision of the Circuit Court below on the effect of the long continued failure to assert rights to the composition in conflict with the decision of this Court in *Menendez* v. *Holt*, 128 U.S. 514. On the contrary, the decision of this Court in the cited case recognizes that a delay or acquiescence may be "continued so long and under such circumstances as to defeat the right itself". The Trial Court found as a fact that in the instant case there was a "delay of nearly a quarter of a century in asserting his rights to copyright" (R. 20).

## POINT III.

### This Court Will Not Review Questions of Fact, Nor Concurrent Findings of Fact.

The District Court found:

(a) That "The Caisson Song" was abandoned or dedicated to the public use.

(b) That the composer never assigned the musical composition to Egner and Mayer and consequently that Egner and Mayer never became the proprietors thereof.

(c) That although "The Caisson Song" was being openly notoriously and continuously published by others, Gruber, the author, never asserted any rights of ownership for over 20 years. Egner and Mayer likewise made no protest.

These facts having been found by the District Court, the legal conclusion necessarily followed that the composition

was not protected by statutory copyright because of failure to comply with the statute and because of a long continued failure to assert rights therein which amounted to an abandonment thereof.

As has been well said:

> "In the last analysis, publication, or dedication to the public, is a question of fact in each case." Weil on Copyright, page 157.

In such cases this Court will not grant certiorari for the purpose of reviewing the evidence or the inferences drawn from it.

> *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178.

Finally, in the present case, as in *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 64 S. Ct. R. 593, 594:

> "The Circuit Court of Appeals re-examined the findings in the light of the evidence and accepted them. It must be a strong case in which this court will set aside these concurrent findings of two courts."

## POINT IV.

### The Finding That There Was no Assignment by Gruber to Egner and Mayer is Amply Supported by the Evidence.

The petitioners admit that some evidence supports the finding of both Courts that there was no assignment by Gruber to Egner and Mayer. They only question the "quantum" of proof submitted. They suggest that the District Court was not justified in rejecting the testimony of Mayer, stating at page 14 of their brief:

> "His testimony was not contradicted, was not unreasonable or improbable or in its nature surprising or sus-

> picious, and from no reasonable point of view was it open to doubt."

The contrary appears clearly from the record.

Mayer's testimony with respect to the purported assignment was so vague and uncertain that the District Court stated as a fact that he (Mayer)

> "could not state or remember whether that assignment was oral or written. Nor could he remember that the so-called assignment was made prior to the date of his copyright." (R. 17)

Mayer's entire testimony with respect to the critical points was speculation as distinguished from actual recollection.

But in addition to this, Mayer's testimony was directly contradicted. General Danford testified that he was "under the impression that no arrangements at all were made than through me to give permission to the publishing of same." (Q. 74, R. 164–165.) Plaintiffs' Exhibit 9, the agreement between Egner and Mayer and Shapiro, Bernstein & Co. (R. 201) recited that Egner and Mayer acquired from Gruber "the right and license to print, publish and sell the musical composition". This is the language of a license and falls far short of the complete transfer alleged in the complaint and which Mayer unsuccessfully attempted to establish.

Gruber's subsequent conduct contradicts the claim that he had assigned the song to Egner and Mayer. In 1930 Gruber for the first time attempted to copyright the song, claiming then to be the proprietor thereof. This is inconsistent with the assertion that Gruber had conveyed the song to Egner and Mayer nine years prior thereto. Furthermore, in the application for copyright filed by Gruber (Dft's Ex. 11B, R. 243) in 1930, he stated that he was the author of the words and that the song was then being published for the first time.

Also, in November 1930 Gruber authorized the publication by the Hoover Company of a commercialized parody of the song and sanctioned its earlier use over the radio by the Hoover Company (Dft's Exs. 4 and 5, R. p. 229). Gruber, by thus asserting his ownership of the song, directly contradicted the claim of Mayer that Gruber had conveyed the song to Egner and Mayer in 1921. The circumstances surrounding the use of the song by the Hoover Company under the authority of Mr. Gruber are set forth at length in the opinion of the District Court (R. 18). Because of these circumstances, the District Court was amply justified in finding (R. 17):

> "that Gruber did not assign all of his right, title and interest in the song in 1921 to the plaintiffs Egner and Mayer, but at most gave them permission to include the song in their West Point compilation."

## CONCLUSION.

The petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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April 11, 1944.
Boston, Mass.